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No: 07-1226

In The
Supreme Court of the United States

WAYTEC ELECTRONICS CORPORATION,
Petitioner,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Respondents' brief in opposition confirms the glaring tension between the Circuit Courts' interpretation of *Caterpillar v. Lewis*, 519 U.S. 61 (1996), and this Court's decisions in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), and *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004). Under respondents' logic, in diversity cases District Courts are free to re-write, or simply ignore, the statutory rules for removal – and the resulting decisions will escape appellate review.

Where objections to removal are preserved, permitting federal courts to usurp jurisdiction over improperly removed cases is contrary to the congressionally-established mandates of the removal statutes and antithetical to the very concept of limited federal jurisdiction.

ARGUMENT

I. This is an Uncomplicated Factual Scenario Which Presents the Court with an Opportunity to Reach an Important Question of Federal Jurisdiction Which Circuit Courts Erroneously Have Treated as Moot.

Respondents seek to present the issue before the Court as "fact-bound." (Opp. at 6.) It is not. The facts regarding the removal are neither complicated nor materially disputed: Rohm and Haas filed an initial notice of removal that did not include NLS. (App. 52a.) Rohm and Haas' thirty-day time period to file under 28 U.S.C. § 1446 ended on July 7, thirty days

after service. (App. 89a, fold-out exhibit A.) Rohm and Haas, forty-three days after service, filed a purported "joint" notice on behalf of itself and "tag-along" defendant NLS. (App. 61a – 65a.) The document was filed by Rohm and Haas' counsel and he signed it for both parties. (App. 116a – 118a.) The vague corroboration of this filing from NLS is an e-mail at App. 109a. Because Rohm and Haas plainly did not have NLS' counsel's signature "on the document," it filed a notice of the removal in state court by interposing a hand-written signature (signed in ink by Rohm and Haas' counsel) on NLS' signature line. (App. 76a, fold-out.)

Waytec objected to the inadequacy of the original "joint notice" and moved for remand, (App. 67a-71a, 77a-87a), pointing out that one party cannot sign for another in a removal context (and particularly cannot do so more than thirty days after service) (*e.g.* App. 69a-70a, 82a, 83a), and that NLS had not itself filed or signed a removal notice within the statutory time period. (App. 70a-71a, 81a-84a.) NLS then filed its own notice of removal after the expiration of its thirty-day period. (App. 90a.) Waytec *again* objected and renewed its motion to remand. (App. 96a-100a.) Waytec complained that respondents had failed to comply with both the rigors of the removal statute and the local rules. (*e.g.* App. 68a-71a, 86a-87a.)

Respondents make much of the District Court's supposed "discretion" in arguing that they complied with that court's local rules. There is no evidence to

support such a finding of compliance.[1] More importantly, respondents' repeated references to the District Court's "discretion" in interpreting local rules cannot mask the plain fact that the Fourth Circuit simply declined to review the District Court's denial of remand – for abuse of discretion or otherwise.[2] Rather, it simply found the defect – which it classified as "procedural" – unreviewable under *Caterpillar v. Lewis*, 519 U.S. 61 (1996). (App. 8a.)

At the same time, respondents' brief confirms their failure to comply with the local rules and, more importantly, with the governing statute, 28 U.S.C. § 1446. Respondents' brief in opposition tacitly acknowledges that Rohm and Haas signed and filed the late Notice on behalf of both defendants and that

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[1] Giving "deference" to a trial court "does not mean appellate review is an empty exercise." *See Koon v. U.S.*, 518 U.S. 81, 98 (1996). Moreover, the District Court here failed to adhere to the admonition of *Shamrock Oil* that removal requirements must be strictly construed. 313 U.S. at 108-09.

[2] Indeed, since the Fourth Circuit's ruling in the present case, that Court has gone even further in ruling that a trial judge could not *sua sponte* remand a case that appeared to the District Court to have been improperly removed because the complaint did not show that the amount in controversy requirement was met. *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 194 (4th Cir. 2008) ("Because the *sua sponte* remand order of the district court did not rely on lack of subject matter jurisdiction, but rather on a procedural defect in pleading that was not timely raised by the plaintiff," the appellate court may review and reverse the District Court's ruling despite the admonitions of 28 U.S.C. § 1447(d).)

NLS did not provide a signature "on the document"[3] but merely sent a tentative e-mail (App. 109a) subject to comment from NLS' corporate counsel. (Opp. at 9, 10.) But extra-judicial consent is not enough. (*See* Petition at 25, fn. 7.) Moreover, respondents simply fail to address the fact that Rohm and Haas filed and signed this document ***forty-three*** days after service, long after the expiration of its statutory thirty-day limit under 28 U.S.C. § 1446.

Respondents' brief similarly ignores the legion of cases holding that counsel for one party cannot sign a removal notice for another in a non-electronic filing context. (Petition at 25, fn.7.) Respondents offer no explanation – indeed, no argument whatsoever – why electronic filing should change the long-standing and firmly-rooted rules regarding removal practice. The many cases interpreting 28 U.S.C. § 1446 found in Waytec's Petition properly analyze the statute. Even if respondents had properly interpreted the local rule (which they did not), a local rule cannot trump a federal statute. 28 U.S.C. § 2071 (local rules "shall be consistent with Acts of Congress."); *Frazier v. Heebe*, 482 U.S. 641, 645-46 (1987).[4]

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[3] The applicable local rules required counsel for Rohm and Haas not only to obtain consent from NLS' counsel, but to "obtain the signatures of all attorneys on the document." (App. 126a-127a.)

[4] Respondents' suggestion that Waytec waived objection to the local rule is also erroneous. Waytec plainly argued both that the local rule had not been followed, and, more importantly, that there was a clear failure to comply with the mandatory statute. (*E.g.*, App. 86a-87a, 68a-70a.) Waytec preserved its objection. Respondents' suggestion that Waytec failed to object to the

II. Federal Courts Do Not Entertain "Default Jurisdiction" Over State Law Actions Where Removal is Defective, the Defect Cannot Be Cured, and the Objection is Preserved.

The Fourth Circuit and numerous other Circuit Courts have treated non-compliance with the mandatory requirements of the removal statutes as a "procedural" defect that can be ignored upon final judgment so long as diversity jurisdiction exists. Respondents similarly interpret *Caterpillar* to hold that a defect as to subject matter jurisdiction is reviewable, while a defect involving *statutory compliance* is always "technical," "procedural" and, therefore, moot. In respondents' view: "in light of *Caterpillar's* holding, it was unnecessary for the Fourth Circuit to decide whether removal was defective." (Opp. at 17; *see also,* Opp. at 19, "the Fourth Circuit never reached the question whether removal was defective; it did not have to.") Thus, Respondents' openly embrace the position that preserved objections to "procedural" defects – *i.e.*, objections to a failure to comply with mandatory statutory removal requirements – simply do not matter. Under respondents' analysis – and the Fourth Circuit's holding – a failure to comply with mandatory, "procedural" statutory dictates will *always* be

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District Court's lack of "jurisdiction" is equally misguided. (Opp. at 19.) Waytec sought remand and objected to the removal *repeatedly* based on the lack of compliance with the mandatory requirements of 28 U.S. § 1446. (*See, e.g.*, App. 86a-87a.) Under *Caterpillar*, Waytec did everything it possibly could do to preserve its objection to proceeding in the federal forum. 519 U.S. at 74.

unreviewable on appeal as long as diversity jurisdiction exists on the face of the complaint.

By contrast, Waytec's position is that violations of the mandatory statutory prerequisites for removal must matter. Unless these mandatory requirements are met, removal is inappropriate under the governing statute – the source of federal jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992).

CONCLUSION

Waytec's state law claims belonged in state court – where they were filed – unless properly removed to federal court. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002); *Gerling v. Baltimore & Ohio R. Co.*, 151 U.S. 673 (1894); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). As noted in Waytec's Petition, a plaintiff can choose to waive a statutory defect in removal and the case may then proceed in federal court so long as subject matter jurisdiction is otherwise present. But where, as here, the removal is fatally flawed, and the objection is repeatedly and adamantly preserved, remand is the remedy. *See Gerling*, 151 U.S. at 687.

This case involves a significant question involving the scope of federal jurisdiction which merits this Court's review.

Respectfully Submitted,

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